

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRI MUNGER)	
Claimant)	
VS.)	
)	Docket No. 163,479
KENTUCKY FRIED CHICKEN)	
Respondent)	
AND)	
)	
COMMERCIAL UNION INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the Award dated March 28, 1996, entered by Special Administrative Law Judge Douglas F. Martin.

APPEARANCES

Bruce A. Brumley of Topeka, Kansas, appeared for the claimant. Kip A. Kubin of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Special Administrative Law Judge awarded claimant benefits for a 47 percent permanent partial general disability. Respondent and its insurance carrier requested the Appeals Board to review that finding. The only issue before the Appeals Board on this review is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be modified.

The parties stipulated claimant sustained personal injury by accident arising out of and in the course of employment with the respondent on October 6, 1991. On that date, claimant was managing a Kentucky Fried Chicken restaurant for the respondent.

After initially recovering from the accident, claimant attempted to return to work for the respondent and was able to work for only three or four days until her physician again took her off work. Except for that three-or-four-day period, claimant remained off work after the October 1991 accident until August 1994 when she obtained a job performing clerical work as an administrative assistant at a women's shelter.

The Special Administrative Law Judge found that claimant was unable to perform work in the medium physical demand level and awarded claimant permanent partial general disability benefits for a 47 percent work disability. Claimant contends the award should be affirmed. On the other hand, respondent and its insurance carrier contend claimant's benefits should be limited to those of a functional impairment only. In the alternative, they contend claimant has, at most, a 21 percent work disability.

Claimant presented the testimony of board-certified internist Eric Sollars, M.D. He is also claimant's family physician. He saw claimant approximately 29 times between March 19, 1992, and August 31, 1993. During that period, claimant obtained medical treatment for pain and spasm in her arm, neck, and back. In May 1992, Dr. Sollars rated claimant as having a 25 percent whole body functional impairment and in January 1993 increased that rating to 55 percent. At one time the doctor believed claimant was not employable due to her chronic pain. In a letter dated January 11, 1993, the doctor wrote that claimant should avoid lifting anything greater than 10 pounds and avoid bending, prolonged sitting, and reaching above her head.

Claimant also presented the testimony of Peter V. Bieri, M.D. He saw claimant one time in March 1994 at claimant's attorney's request. He diagnosed a disc bulge at the C5-6 intervertebral level, left iliolumbar chronic ligament strain, and post-traumatic lumbar myofascial pain syndrome. He believes claimant has a 21 percent whole body functional impairment according to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). Although the doctor's initial report indicated claimant could perform medium work, at his deposition he testified that his initial report was inaccurate and claimant should limit herself to light work which does not require frequent lifting greater than 10 pounds or single lifts greater than 20 pounds.

P. Brent Koprivica, M.D., who is board certified in emergency medicine, also testified. He saw claimant in November 1994 after an administrative law judge requested he provide an independent medical evaluation. He diagnosed “chronic pain syndrome associated with a fibromyalgia type of syndrome,” and believes claimant has a 15 percent whole body functional impairment as a result of that condition. He also utilized the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). Although he believes claimant could perform physical labor in the medium demand level without risking reinjury, he thought it questionable whether claimant could tolerate the pain those activities would produce.

Because hers is an “unscheduled” injury, claimant’s entitlement to permanent partial general disability benefits is governed by K.S.A. 1991 Supp. 44-510e which provides in pertinent part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee’s education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

The existence, nature, and extent of the disability of an injured worker is a question of fact. Medical testimony is not essential to establish those facts. Therefore, the fact finder is free to consider all the evidence and decide for itself the percentage of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Based upon the testimony of Drs. Bieri and Koprivica, the Appeals Board finds claimant retains the ability to perform work in the light and sedentary physical demand levels. The Appeals Board also finds claimant has an 18 percent whole body functional impairment rating which is an average of the ratings provided by Drs. Bieri and Koprivica. The Appeals Board is not persuaded by Dr. Sollar’s opinions of either claimant’s functional impairment or medical restrictions.

The Appeals Board also finds that claimant has lost 48 percent of her ability to perform work in the open labor market. That conclusion is based upon the testimony of the only vocational expert to testify, Michael Dreiling. He testified jobs in the medium physical demand level constituted 38 percent of the open labor market and jobs in the heavier demand levels constituted 10 percent of the labor market. Because the Appeals Board finds that claimant cannot perform work beyond the light physical demand level,

claimant has lost 48 percent (38 percent plus 10 percent) of her ability to perform work in the open labor market as a result of her October 6, 1991, accident.

The Appeals Board agrees with the Special Administrative Law Judge that claimant has lost 32 percent of her ability to earn a comparable wage as a result of the work-related accident. The parties do not dispute the Special Administrative Law Judge's finding of loss of ability to earn a comparable wage and, therefore, that finding is adopted by the Appeals Board as its own as it appears reasonable in light of the evidence presented.

As required by K.S.A. 1991 Supp. 44-510e, the Appeals Board considers both the 48 percent loss of ability to perform work in the open labor market and the 32 percent loss of ability to earn a comparable wage and finds that claimant has a 40 percent permanent partial general disability upon which claimant's award should be based.

The Appeals Board notes that at oral argument claimant argued the respondent's and insurance carrier's appeal should be dismissed because they failed to file their brief in a timely manner. The Appeals Board has ruled on numerous occasions it does not have the statutory or regulatory authority to dismiss an appeal on that basis. Therefore, claimant's request for dismissal must be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated March 28, 1996, entered by Special Administrative Law Judge Douglas F. Martin should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Terri Munger, and against the respondent, Kentucky Fried Chicken, and its insurance carrier, Commercial Union Insurance Companies, for an accidental injury which occurred October 6, 1991, and based upon an average weekly wage of \$389.46 for 141 weeks of temporary total disability compensation at the rate of \$259.65 per week or \$36,610.65, followed by 274 weeks at the rate of \$103.86 per week or \$28,457.64, for a 40% permanent partial general disability, making a total award of \$65,068.29.

As of August 26, 1997, there is due and owing claimant 141 weeks of temporary total disability compensation at the rate of \$259.65 per week or \$36,610.65, followed by 166.29 weeks of permanent partial compensation at the rate of \$103.86 per week in the sum of \$17,270.88 for a total of \$53,881.53, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$11,186.76 is to be paid for 107.71 weeks at the rate of \$103.86 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts as its own the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bruce A. Brumley, Topeka, KS
Kip A. Kubin, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director